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IN THE

Supreme Court of the United States

ENGINE MANUFACTURERS ASSOCIATION AND WESTERN STATES PETROLEUM ASSOCIATION,

Petitioners,

v.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

INTRODUCTION

Petitioners Engine Manufacturers Association and the Western States Petroleum Association hereby respectfully submit this Reply Brief in support of the pending petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

I. THE CONFLICT WITH THE FIRST AND SECOND CIRCUIT DECISIONS IS REAL.

Respondent's brief in opposition attempts to obscure the conflict between the Ninth Circuit's decision in this case and the decisions in the First and Second Circuits by disregarding the major premise of both of the latter decisions. Respondent

describes the cases as though the sole question in each was whether the challenged state regulations qualified for the "opt-in" waiver of preemption granted by Section 177 of the Clean Air Act (42 U.S.C. § 7507). *See* Opp. Br. 9, 10. That is an incorrect account of the decisions. Before reaching the Section 177 question, the court in each case determined that the regulations were covered by the preemption language of Section 209(a) (42 U.S.C. § 7543(a)). That determination was essential to the decision reached in each case, because if the regulations were not covered by Section 209(a) in the first place, they would have been permissible despite their failure to comply with Section 177.

The Second Circuit's opinion said, "We first address the question left open in *MVMA III*, 17 F.3d at 536, namely, whether the ZEV requirement is a 'standard relating to the control of emissions' and therefore within Section 209's preemptive scope." *American Auto. Mfrs. Ass'n* v. *Cahill*, 152 F.3d 196, 199 (2d Cir. 1998). The court's holding on this point was: "We agree with the Manufacturers that the ZEV sales requirement is a 'standard relating to the control of emissions' and is therefore preempted by Section 209 of the Clean Air Act." *Id.* at 197.

Similarly, the First Circuit's opinion first considered, as a distinct point, whether the Massachusetts regulations were standards within the meaning of Section 209 (and the identical language of Section 177) and said, "We share the opinion of the Court of Appeals for the Second Circuit that 'the ZEV sales requirement must be considered a standard 'relating to the control of emissions.' " *Association of Int'l Auto. Mfrs.* v. *Commissioner, Massachusetts Dep't of Envtl. Protection*, 208 F.3d 1, 6 (lst Cir. 2000).

The Second Circuit's interpretation of the preemption language of Section 209 was clear and simple: "We view 'standards relating to the control of emissions' as describing regulatory measures intended to lower the level of auto

emissions." 152 F.3d at 200. It held the ZEV regulations preempted because "a requirement that a particular percentage of vehicle sales be ZEVs has no purpose other than to effect a general reduction in emissions." *Ibid.* The First Circuit echoed the test: "[T]he very purpose and effect of the ZEV mandates is to effect a quantitative reduction in emissions. * * * As such, they fall squarely within the language of §§ 209 and 177." 208 F.3d at 7.

The language from the Second Circuit opinion quoted by Respondent at pp. 9-10 of its brief was used by the Second Circuit, not in defining the scope of Section 209, but in explaining why compliance with the opt-in provisions of Section 177 necessitates strict identity with the "California standards." 152 F.3d at 201. Those observations did not limit or qualify the court's broad view of the preemption provision.

Nor did the First Circuit suggest that only a "production" requirement is preempted by Section 209, as Respondent attempts to suggest. *See* Opp. Br. 11. To the contrary, the EPA letter quoted by the court as supporting its conclusion correctly noted that a production requirement must be considered part of the "standard-setting process," not that a "production requirement" is the only kind of regulation that falls within the preemptive reach of Section 209.

The Ninth Circuit's decision in this case cannot be reconciled with the interpretation of Section 209 adopted by the First and Second Circuits. The cases are "distinguishable" only in the sense that any two cases with any different facts are said by lawyers to be "distinguishable." There is no sensible reasoning that will harmonize the rationale and result of the Ninth Circuit decision with the rationale and result of the other two decisions.

There can be no doubt that the "very purpose and effect" of the Fleet Rules is to "effect a quantitative reduction in emissions" within the District. The District Court opinion

adopted by the Ninth Circuit did not deny (and could not have denied) that the Fleet Rules have such a purpose and effect. Instead, the court adopted a mechanistic test for deciding whether regulations are "standards relating to the control of emissions"—namely, if the regulations take the form of restrictions on "purchases" rather than on "sales" or "manufacture" there is no preemption. This means that if New York or Massachusetts, instead of requiring the sale of a certain percentage of ZEV vehicles, had forbidden the *purchase* of any vehicles *other than* LEV vehicles, their regulations would not be preempted. It cannot reasonably be doubted, however, that any such regulations would be held to be preempted under the *Cahill* and *Commissioner* decisions.

The scope of Section 209's preemption may or may not be adequately delimited by the First and Second Circuit opinions, but there is certainly a genuine conflict between those cases and the decision of the Ninth Circuit. The divergence is so striking that it calls strongly for resolution by this Court. As long as the Ninth Circuit decision stands, it is an invitation to other States, and to local government entities everywhere, to adopt whatever emission-control standards they choose, provided they take the form of restrictions on the types of vehicles and vehicle engines that may be purchased.

II. THE DECISION BELOW FAILS TO FOLLOW THIS COURT'S ADMONITIONS THAT PREEMPTION ANALYSIS MUST FOCUS FIRST ON "THE PLAIN WORDING" OF AN EXPRESS PREEMPTION CLAUSE.

This Court has repeatedly emphasized that when a federal statute contains an express preemption clause, interpretation "must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993); *Sprietsma* v. *Mercury Marine*, ___ U.S. ___, 123 S. Ct. 518, 526 (2002). The

opinion below disregards that principle by failing to give any effect to the phrase "relating to the control of emissions" in the express preemption clause that governs this case. In effect the court has said that the Fleet Rules are not preempted because they do not constitute an "emission standard." But if Congress had meant to limit the preemption solely to "emission standards," it would no doubt have said simply that no state shall adopt "emission standards." Instead it said that no state shall adopt any standard "relating to the control of emissions," by which it could only have meant to preempt some types of emission-control regulations that are not themselves "emission standards." The opinion below fails to acknowledge this "plain wording" of the preemption clause or to offer any explanation why that language does not encompass the Fleet Rules.

Respondent seems to suggest that the phrase "relating to" should be ignored. But this Court's decisions do not permit reading the phrase out of the statute. They acknowledge that the phrase, if taken literally, could extend without limit, but they do not say it means nothing. In the *Dillingham* case, on which Respondent relies, the Court reiterated its long line of cases recognizing that the preemption clause of ERISA is "clearly expansive," has "a broad scope" and "an expansive sweep," and is "conspicuous for its breadth." *California Div. of Labor Standards Enforcement* v. *Dillingham*, 519 U.S. 316, 324 (1997). The Court then restated the narrowing construction that previous decisions had placed on the "expansive sweep" of the clause's language, and applied it to the specific case before the Court. Nor did Justice Scalia's concurring opinion suggest that the preemption clause was to be read as though the language "relating to" had been left out of the clause; rather, the language preceded by "relating to" was to be taken as identifying the field in which ordinary preemption operates. *See* 519 U.S. at 336. The opinion of the Ninth Circuit in this case comports with neither the

majority nor the concurring opinion's approach in the *Dillingham* case.

Respondent also repeats the District Court's erroneous reliance on Section 246 of the Clean Air Act, 42 U.S.C. § 7586, as limiting the scope of the preemption clause of Section 209(a). *See* Opp. Br. 16. The significance of Section 246 is just the opposite. By imposing a *federal* requirement of fleet-purchase regulations, conforming to all the specifications of Section 246 and subject to approval by federal authority, Congress clearly showed that it regarded such regulations as within the scope of the kinds of emission control reserved for determination on a national basis. Indeed, the requirements prescribed by Congress in Section 246 included the requirement that such a fleet-purchase plan must leave the choice of clean-fuel vehicles to the fleet operator, a requirement that is squarely violated by the Fleet Rules at issue in this case. *See* 42 U.S.C. § 7586(d). Thus, it is undisputed that the Fleet Rules of the SCAQMD cannot be supported under Section 246. Aside from the fact that they do not conform to the requirements of Section 246, the State of California affirmatively opted out of Section 246, as it was permitted to do with the permission of the federal EPA, which was given. *See* 64 Fed. Reg. 46849 (Aug. 27, 1999). The District Court's fallacious use of Section 246 only illustrates further the extent of its departure from a faithful construction of the preemption clause at issue in this case.

III. THE CONFLICTING DECISIONS DO PRESENT AN ISSUE OF NATIONAL IMPORTANCE.

Conflicts on questions of preemption are intrinsically important because they deal with difficult questions of allocation of authority between the national and state governments and thus of respect for the Supremacy Clause. The importance of such questions is indicated by the frequency with which this Court has addressed them in recent years. In this

case, however, the intrinsic importance of a preemption issue is heightened by the fact that it affects the division of authority over a major national industry whose operations in interstate commerce constitute a vital part of the economy.

Restrictions on the purchase of particular types of vehicles alter the demand conditions manufacturers face. Changes in demand necessitate changes in production and alter the volume of output for the different types of vehicles and engines a manufacturer produces. Changes in volume affect costs, and therefore prices. It is gross oversimplification to suggest, as the courts below have done, that restrictions on purchasers impose no requirements on manufacturers.

The question raised by this case is whether the broad reservation by Congress of national authority to determine the constraints under which manufacturers must operate for the purpose of controlling emissions may be whittled away by restrictions on "purchases" when similar restrictions on "sales" would undoubtedly be forbidden. That is an important question.

CONCLUSION

For the foregoing reasons, and for those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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